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In the

Supreme Court of the United States

Reginald A. Wilkinson, et al.,

Petitioners,

v.

Hbrandon Lee Flagner,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief of the States of New Jersey, Alaska, California, Colorado, Delaware, Florida, Indiana, Iowa, Kansas, Louisiana, Michigan, Missouri, Nebraska, Nevada, Oklahoma, South Carolina, Tenessee, U.S. Virgin Islands, Utah, Virginia and Wyoming as Amici Curiae in Support of Petitioners

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STATEMENT OF AMICI INTEREST

The amici States have a compelling interest in protecting the security of their prisons through the uniform application of prison regulations intended to protect corrections officers, to inhibit inmate escapes, and to facilitate the secure and orderly operation of correctional institutions. The Sixth Circuit's decision to scrutinize constitutionally valid prison disciplinary regulations on a case-by-case basis for the purpose of creating individual-inmate exceptions to those rules, merely because certain prisoners happen to have no history of serious disciplinary infractions, threatens the security of prisons nationwide by unnecessarily restricting State prison officials in the execution of their responsibilities. The potential impact of the Sixth Circuit's ill-considered and legally flawed decision on the operation of State correctional facilities, and the resulting threat to public safety, warrant review by this Court.

The Sixth Circuit has determined, contrary to the holdings of this Court and other courts of appeals, that the judiciary may decide, on a case-by-case basis, whether a specific inmate may be exempted from abiding by constitutionally valid prison regulations. This decision challenges the efforts of this Court to protect the deference given to prison administrators in maintaining security in correctional facilities. Specifically, this Court has repeatedly found that "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (*citing Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 128 (1977)). Thus, "[p]rison administrators...should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* As a result, "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations" because "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Turner v. Safley*, 482

U.S. 78 (*citing Procunier v. Martinez*, 416 U.S. 396, 405 (1974)).

Nevertheless, the Sixth Circuit has found that the judiciary may substitute its judgment for that of State prison officials to determine whether a particular inmate may be exempted from valid prison regulations based on the inmate's prior disciplinary history. If the Sixth Circuit's decision is permitted to stand, the corrosive impact on prison safety will grow as the number of inmates seeking exemptions from otherwise generally applicable regulations rises. Moreover, if the courts substitute their judgment for that of prison officials and permit exemptions for individual inmates from security regulations, the ability of prison officials to maintain security will inevitably falter, thereby placing the safety and welfare of prison staff, inmates, and the general public at risk.

The Petition for Certiorari filed by the State of Ohio details how the decision of the Sixth Circuit conflicts with the legal precedents of this Court and the decision of other courts of appeals and highlights the detrimental effect of the Sixth Circuit's decision on prison security. The amici States bring to the Court's attention the widespread effect of this decision on state correctional facilities nationwide. In light of the dangerous implications to prison security presented by the Sixth Circuit's decision and the importance of the issue presented in the petition, the amici States join Ohio in urging the Court to grant certiorari.

SUMMARY OF ARGUMENT

Review of the question presented by the petition is a matter of critical importance to the amici States because the decision by the Sixth Circuit to allow individual inmates to litigate, on a case-by-case basis, whether the inmate may be exempted from a constitutionally valid prison regulation threatens the security of correctional institutions throughout the country. Despite this Court's unequivocal holding that "prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry," *Bell v. Wolfish*, *supra*, 441 U.S. at 546, the Sixth Circuit undermined the important work of State prison officials by arming inmates with a novel and potentially far-reaching method of evading appropriate and necessary prison regulations.

The decision of the Sixth Circuit, if not reversed, will certainly impact the States' ability to manage safely their prisons by erecting an obstacle to the enforcement of regulations created to prevent security problems, and to protect corrections officers, inmates and the public. If followed by other courts of appeals, the rationale of the Sixth Circuit will necessitate an unmanageable and unnecessary tracking by prison administrators of individual-inmate exceptions to hundreds of prison rules. Ultimately, the Sixth Circuit's decision to allow repeated inmate challenges to otherwise valid prison regulations will create an unworkable patchwork of regulations and exceptions that will neither be manageable nor enforceable in an institutional setting that requires order and security to survive.

ARGUMENT

THE DECISION OF THE SIXTH CIRCUIT TO ALLOW INDIVIDUAL-INMATE EXEMPTIONS FROM CONSTITUTIONALLY VALID PRISON SECURITY REGULATIONS THREATENS THE ORDERLY OPERATION OF CORRECTIONAL INSTITUTIONS NATIONWIDE, WARRANTING REVIEW BY THIS COURT.

The Sixth Circuit's decision creates both a security hazard within our nation's correctional institutions and offends this Court's precedents by removing security and administrative decisions from State prison officials in favor of the substituted judgment of the judiciary. The Sixth Circuit has determined that an inmate who seeks to challenge a prison regulation previously determined to be constitutional may subject the regulation to fresh scrutiny under an analysis tailored specifically to the individual inmate's circumstances. This determination is contrary to *Turner v. Safley, supra*, and other Supreme Court decisions. *See O'Lone v. Shabazz*, 482 U.S. 342 (1987); *Bell v. Wolfish, supra*, 441 U.S. 520 (1979); *Jones v. North Carolina Prisoners Labor Union, supra*, 433 U.S. 119 (1977).

Contrary to the finding of the Sixth Circuit, this Court has routinely accorded a great amount of deference to the decisions of State prison officials regarding the administration, operation and security of their institutions. For example, in *Procunier v. Martinez, supra*, this Court expressed the importance of providing deference to the decisions of prison authorities. The Court found:

> Traditionally, federal courts have adopted a broad hands--off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More

> fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention . . . . Suffice it to say that the problems of prisons in America are complex and intractable, and . . . are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

Procunier v. Martinez, supra, 416 U.S. at 404-405.

This Court has clearly provided that State prison administrators are to be accorded deference in the administration, operation and security of their institutions. For example, in *Bell v. Wolfish, supra*, this Court found that "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish, supra*, 441 U.S. at 547, (*citing Jones v. North Carolina Prisoners' Labor Union, supra*, 433 U.S. at 128). "[W]e have often said that evaluation of penological objectives is committed to the considered judgment of prison administrators, 'who are actually charged with and trained in the running of the particular institution under examination.'" *O'Lone v. Shabazz, supra*, 482 U.S. at 349.

In addition, contrary to the Sixth Circuit's finding that prison regulations may be subjected to repeated scrutiny on

the basis of the vagaries of each inmate's disciplinary history, this Court has specified that a State prison regulation, once found to meet constitutional muster, should not be subjected to repeated challenges. This Court's decision in *Turner v. Safley, supra*, is instructive with respect to the across-the-board application of constitutionally valid prison regulations to all inmates, rather than the case-by-case obstacle course mandated by the Sixth Circuit. As the dissenting judge in *Flagner* noted:

> By creating the *Turner* test, the Supreme Court surely did not intend to provide a mechanism through which prisoners could mount repeated challenges to prison regulations and require courts to analyze, in detail, the impact such regulations would have in any particular factual setting, even if prior court precedent would seem to dictate the validity of the regulations. On the contrary: the Supreme Court's creation of the *Turner* standard was motivated by a desire to "ensure the ability of corrections officials to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration, and avoid unnecessary intrusion of the judiciary into problems particularly ill suited to resolution by decree."

Flagner v. Wilkinson, 241 F.3d 475, 489 (6th Cir. 2001)(Nelson, C.J., dissenting)(*citing O'Lone v. Shabazz, supra*, 482 U.S. at 349). Judge Nelson convincingly explained that:

> [t]he *Turner* opinion does not imply that an inmate who seeks to challenge a prison regulation the constitutionality of which has already been established is entitled to have the regulation subjected to fresh scrutiny under a four-factor analysis tailored to the plaintiff's individual circumstances.

Flagner v. Wilkinson, supra, 241 F.3d at 489.

Moreover, this Court has repeatedly recognized that "[m]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of . . . convicted prisoners . . . ." *Bell v. Wolfish, supra*, 441 U.S. at 546. "[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Id. (citing Pell v. Procunier, supra*, 417 U.S. at 823). Thus, "prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry." *Id.*, 441 U.S. at 546. However, the decision of the Sixth Circuit hinders the ability of State prison administrators to operate safe and orderly prison facilities and, ultimately, contradicts this Court's instructions to protect the determinations of State prison officials.

The Sixth Circuit has overlooked the dynamics of prison life and the problems that lie therein and has placed prison security in jeopardy by doing so. Specifically, the court failed to recognize that prison security regulations are promulgated in anticipation of security problems because such regulations are necessary in order to discourage inmates from endangering safety, escaping, or disrupting correctional facilities. This Court has recognized that it is entirely appropriate for prison officials to enact disciplinary regulations as preventive measures. *See O'Lone v. Shabazz, supra*, 482 U.S. at 349 (corrections officials must have the ability "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration"). Nothing in this Court's precedents suggests that prison officials must wait for an inmate to create a risk to safety before imposing valid restrictions on prisoner behavior. To require such an approach would eliminate the ability of State officials to anticipate threats to security before they

occur and deter dangerous behavior through predictable and uniform application of disciplinary regulations.

The Sixth Circuit further fails to recognize that a personal exemption from regulations will permit an inmate to easily cause a security threat by implicitly authorizing otherwise prohibited and potentially dangerous conduct. Rather, the court bases its decision on the unrealistic prediction that simply because an inmate has not engaged in a specific security problem in the past he or she will continue to behave in an appropriate manner, even without the threat of discipline for misconduct. This reasoning is contrary to the findings of this Court and fails to consider the criminal element that is housed in our nation's prisons. It strains reason to suggest that convicted criminals will abide by prison regulations during their incarceration if they are aware that exceptions to the rules are doled out by the courts based on a lack of previous disciplinary infractions.

This Court has consistently recognized the unique dynamics of prisons and the resulting effect on security. For example, in *Jones v. North Carolina Prisoners' Labor Union, Inc., supra*, 433 U.S. at 129, this Court explained:

> Prisons, it is obvious, differ in numerous respects from free society. They, to begin with, are populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance. In seeking a 'mutual accommodation between institutional needs and objectives (of prisons) and the provisions of the Constitution that are of general application . . . this Court has repeatedly recognized the need for major restrictions on a prisoner's rights.

(citations omitted).

Similarly, in *Procunier v. Martinez*, *supra*, 416 U.S. at 404, this Court noted that:

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Hurculean obstacles to effective discharge of these duties are too apparent to warrant explication.

Despite the recognition by this Court that, due to the unfortunate but very real dangers presented by prison life State officials are to be given discretion by the judiciary in implementing security regulations, the Sixth Circuit has restricted that discretion by allowing the judiciary to substitute its judgment for that of State officials on a case-by-case basis whenever an inmate can demonstrate that he or she has not previously violated prison rules.

In effect, the decision of the Sixth Circuit will open numerous prison regulations, previously found by this Court to be constitutional, to a new round of judicial review in the federal courts and, ultimately, will produce dangerous results for prison security. For example, in *Turner v. Safley, supra*, this Court upheld a regulation promulgated by the Missouri Division of Corrections prohibiting inmate correspondence between prison institutions. Missouri prison officials provided testimony that the correspondence rule was security based because "mail between institutions can be used to communicate escape plans and to arrange assaults and other violent acts". *Id.*, 482 U.S. at 91. This Court found that the regulation reasonably related to legitimate security concerns of prison officials and upheld its validity. *Id.*

However, under the Sixth Circuit's analysis, inmates confined in a Missouri correctional facility could bring suit

against that State alleging that they should be exempted from the simply because, in the past, they had never used the mail to communicate escape plans or to arrange assaults or other violent acts. As a result, those inmates who qualified for exemptions could freely engage in the exchange of correspondence that communicates escape plans, assaults or other violent acts, the very dangers that the regulations were designed to prevent. Because of the individualized exemptions, Missouri officials would be unable to detect the security threat, the effectiveness of the rule would be severely hampered, and the security of Missouri's prisons jeopardized.

Similarly, in *Bell v. Wolfish, supra*, this Court upheld federal prison security regulations prohibiting receipt of books not sent directly from the manufacturer, as well as packages of food and personal items sent from outside of the prison. The reason for the rules was to keep individuals from smuggling contraband into the institution. *Id.*, 441 U.S. at 555. Under the Sixth Circuit's approach, this Court's decision in *Bell* would be subjected to repeated exemptions for any inmate who had never been caught smuggling contraband into the prison in the past. Such an exemption would enable inmates to smuggle contraband into the prison undetected. A weapon is no less dangerous if it is the first piece of contraband introduced by an inmate into the prison setting. Yet, the Sixth Circuit's decision would allow a free pass to traffic in weapons for any inmate who can demonstrate that he or she has not been adjudicated guilty of violating prison rules in the past.

Moreover, the decision of the Sixth Circuit to permit continual review of valid prison security regulations will have a detrimental effect on numerous State prison systems. For example, the New Jersey Department of Corrections (hereinafter "NJDOC") has adopted security regulations prohibiting participation in or possession of security threat group (gang) materials. *See New Jersey Admin. Code tit.* 10A, §4-4.1(a)*.010 (1999)(prohibiting participation in any activity

related to a security threat group); *N.J. Admin. Code tit.* 10A, §4-4.1(a)*.011 (1999)(prohibiting possession of security threat group materials). The intent of the regulations is to terminate gang-related violence within the NJDOC prison system. *See Blyther v. New Jersey Dep't of Corrections*, 730 A.2d 396 (N.J. Super. Ct. App. Div. 1999). Under the Sixth Circuit's analysis, inmates could mount numerous challenges to these regulations and be awarded judicially sanctioned exemptions merely because they had not previously engaged in gang-related violence. These "exempted" inmates could subsequently possess gang paraphernalia and participate in security threat group activities with impunity until their actions resulted in a breach of security. Until that time, these prisoners could easily congregate and plan gang-related violence, the exact result the regulations were intended to prevent. The threat to prison security in such circumstances is obvious and is in no way mandated by law.

Similarly, security regulations and policies, such as regulations regarding substance abuse testing, grooming, inmate searches, limitations on mailing and phone use, among other security regulations, will be jeopardized if the decision of the Sixth Circuit were to be adopted by other courts of appeals. *See Alaska Admin. Code tit.*, §05.069 (Alaska Department of Corrections security regulation permitting the substance abuse screening of inmates); *New York Comp. Codes R. & Regs. tit.*7, § 200.2 (New York Department of Corrections security regulation allowing the searches of inmates after visitation to prevent the possession of contraband); 37 *P.A. Code* §93.2 (Pennsylvania Department of Corrections security regulation permitting the opening and examination of incoming inmate mail to prevent the entry of contraband); *Michigan PD* § 04.04.113 (Michigan Department of Corrections Policy Directive permitting the identification and management of security threat groups and their members); *Ohio Admin. Code* § 5120-9-25(D)(F) (Ohio Department of Corrections security regulation requiring inmate compliance with grooming specifications for the

detection of contraband). Notably, most States have enacted similar regulations and policies in anticipation of prison security issues that would be directly affected by the rationale of the Sixth Circuit. If the decision of the Sixth Circuit is permitted to stand as a viable option for other courts of appeals, countless inmates may be exempted from these and other prison security regulations, resulting in the unencumbered ability of inmates to wreak havoc on our nation's prison security.

Moreover, the decision of the Sixth Circuit invites a dangerous lack of uniformity in the application of prison rules. Equal treatment of inmates in the context of disciplinary decisions is essential to the perception of fairness among prisoners. However, an even-handed application of security regulations is not possible if individual inmates can claim an exemption from rules that are applicable to other prisoners.

The potential effect of the Sixth Circuit's decision clearly offends the precedents of this Court that allows State prison officials to promulgate policies in anticipation of dangerous activity by inmates. *See O'Lone v. Shabazz, supra*, 482 U.S. at 349. Moreover, the *Flagner* decision contradicts this Court's mandate that State prison officials be accorded judicial deference in matters of security and prison administration. *See Turner v. Safley, supra,* 482 U.S. 78; *Pell v. Procunier, supra,* 417 U.S. 817; *Bell v. Wolfish, supra,* 441 U.S. 520. If permitted to stand, the decision of the Sixth Circuit will jeopardize the ability of the States to maintain security in their prisons, thereby placing the safety and welfare of prison staff, inmates and the general public at risk.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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